A

VIJAYALAKSHMI DEVI NADCHATIRAM

v.

MAHADEVI NADCHATIRAM

B

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSSOF JCA
TENGKU BAHARUDIN SHAH JCA
JAMES FOONG JCA
[CIVIL NO. W-02-903-2005]

C

16 AUGUST 2006

CIVIL PROCEDURE: *Appeal - Competency of appeal - No leave obtained - Appeal related to costs only and not to issues of law and principles - Whether failure to obtain leave rendered appeal incompetent -*

D *Courts of Judicature Act 1964, s. 68(1)(c)*

The appellant was a contributory of a private limited company wound up by an order of the High Court. She lodged a private caveat over a piece of land owned by the company. The

E appointed liquidator of the company successfully obtained an *ex parte* order to remove the said caveat. The appellant applied to set aside the *ex parte* order but was unsuccessful as the respondent (who was the 2nd defendant in the winding-up petition of the company) succeeded in opposing the application. The respondent

F then filed a bill of costs claiming a sum of RM350,000 for getting up fee but the registrar taxed the said bill in the sum of RM250,000. The appellant applied for a review of the registrar's decision and whilst this was pending, she filed an application (encl. 256) to nullify the registrar's decision on the said bill. The learned

G judge of the High Court dismissed the application primarily on the ground that the appellant's application was premature since the taxed costs was subject to review. Hence, the appellant's appeal. The respondent raised a preliminary objection pursuant to s. 68(1)(c) of the Courts of Judicature Act 1964 that the appeal

H was incompetent as leave was not obtained. Against this, the appellant contended that the appeal did not relate to costs only but also to other matters. As such, it could be entertained without leave.

I

Held (dismissing the appeal)
Per James Foong JCA delivering the judgment of the court:

(1) All the substantive prayers in encl. 256 related to the taxed bill of costs by the Registrar. In the first prayer, the appellant requested that the Registrar's order be set aside. In the second and third prayers the requests were for consequential orders in the event the first prayer was allowed. The fourth prayer was pleaded in the alternative to the third prayer that again was dependent on the success of the first prayer. Therefore, in essence the appellant's application in encl. 256 was for the revocation of the Registrar's order made solely on the issue of costs. In dealing with an appeal of this nature, the true character of the matter under appeal should not be lost. The appellant's attempt to convince the court that the order of costs involved law and principles and that it was part of a larger appeal were all but a smoke screen to hide the true character of the matter under appeal. In conclusion, the appeal related to costs only. Hence, it was incompetent as leave was not obtained. (paras 15 & 16)

Bahasa Malaysia *translation of headnotes*

Perayu adalah seorang pemegang saham sebuah syarikat sendirian berhad yang digulung atas perintah mahkamah. Perayu telah mendaftar kaveat persendirian ke atas sebidang tanah yang dimiliki oleh syarikat. Berikutnya, penyelesai yang dilantik untuk syarikat berjaya mendapat perintah *ex parte* bagi menyingkir kaveat perayu. Perayu memohon untuk mengenepikan perintah *ex parte*, tetapi gagal disebabkan responden (iaitu defendan kedua dalam petisyen penggulungan syarikat) berjaya menentang permohonan perayu. Responden kemudian memfail bil kos menuntut sejumlah RM350,000 untuk bayaran 'getting up' tetapi bil tersebut telah ditaksir oleh pendaftar sebanyak RM250,000. Perayu memohon supaya taksiran pendaftar disemak dan sementara menunggu semakan memfailkan permohonan untuk membatalkan taksiran pendaftar (lampiran 256). Yang arif hakim Mahkamah Tinggi menolak permohonan atas alasan, secara pentingnya, bahawa permohonan adalah pra-masa disebabkan kos yang ditaksir masih tertakluk kepada semakan. Perayu telah merayu. Responden membangkitkan bantahan awal di bawah s. 68(1)(c) Akta Mahkamah Kehakiman 1964 bahawa rayuan adalah tidak berkompeten kerana kebenaran untuknya tidak diperolehi. Perayu

membalas bahawa rayuan tidak semata-mata terhad kepada kos tetapi meliputi perkara-perkara lain, dan kerana itu ia boleh didengar walaupun tanpa kebenaran.

Diputuskan (menolak rayuan)

Oleh James Foong HMR menyampaikan penghakiman mahkamah:

(1) Kesemua permohonan di lampiran 256 adalah bersangkut dengan bil kos yang ditaksir oleh pendaftar. Dalam permohonan pertama, perayu memohon supaya perintah pendaftar diketepikan. Dalam permohonan kedua dan ketiga, permohonan adalah untuk perintah-perintah turutan sekiranya permohonan pertama dibenarkan. Permohonan keempat diplidkan sebagai alternatif kepada permohonan ketiga yang juga bergantung kepada kejayaan permohonan pertama. Oleh itu, secara intinya, permohonan perayu di lampiran 256 adalah untuk pembatalan perintah pendaftar yang dibuat khusus atas isu kos. Dalam menangani rayuan seperti ini, sifat sebenar rayuan tidak harus dilepas pandang. Percubaan perayu meyakinkan mahkamah bahawa perintah kos melibatkan undang-undang dan prinsip dan bahawa ia sebahagian dari rayuan yang lebih besar hanyalah kepulan asap bagi mengkaburi sifat sebenar perkara yang dirayui. Hakikatnya, rayuan hanya berkaitan dengan kos sahaja. Oleh itu, ia tidak berkompeten kerana kebenaran tidak diperolehi.

Case(s) referred to:

Anthony Lucas v. The Malayan Cultures Co Ltd [1933] MLJ 21 ***(refd)***
Crystall v. Crystall [1963] 2 All ER 330 ***(refd)***
Wheeler v. Somerfield & Ors [1966] 2 All ER 305 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 68(1)(c)

English Supreme Court Judicature (Consolidation) Act 1925 [UK], s. 31(1)(h)

For the appellant - Malik Imtiaz Sarwar; M/s Satha & Co
For the respondent - M Manoharan; M/s Mahadevi Nadchatiram & Partners

Reported by Usha Thiagarajah

JUDGMENT

James Foong JCA:

Brief Background

[1] The appellant is a contributory of a private limited company known as Nadchatiram Realities (1960) Sdn Bhd (the said company) that was wound-up pursuant to an order made by the High Court at Seremban on 5 September 1988. The official receiver (liquidator) was appointed liquidator of the said company. The said company is solvent. Concerned that the liquidator was proceeding to dispose off a piece of landed property of the said company, the appellant lodged a private caveat over the same. The liquidator, by way of an *ex parte* application, successfully removed the said caveat. When the appellant became aware of this, she applied, by way of summons in chamber in encl. 209, to set aside this *ex parte* order. The respondent (who is the 2nd defendant in the winding up petition of the said company) opposed this application. She was successful and encl. 209 was dismissed with costs awarded to her. Thereafter, the respondent filed a bill of costs claiming a sum of RM350,000 for getting up fee. On 4 January 2002, the getting up fee was taxed down to RM250,000. The registrar of the court who taxed the bill of costs was one Tuan Mohd Nasir bin Nordin (Tuan Mohd Nasir). Dissatisfied with this decision, the appellant applied for a review of the registrar's decision. While this was pending, the appellant on 15 January 2002 wrote to the Chief Judge of Malaya complaining that Tuan Mohd Nasir was impartial and bias and should be disqualified from hearing any further matter on this case. The Chief Judge of Malaya replied to say that the appellant should make a formal application to the registrar for recusal. On 22 January 2002, a date fixed for assessment of damages for the removal of the caveat placed by the appellant, the registrar, Tuan Mohd Nasir, himself, perhaps having knowledge of the appellant's complaint against him, decided to voluntarily recuse himself from hearing all matters concerning the parties in this case and that of their families. Then on 1 March 2004, the Seremban High Court ordered that this case be transferred to the High Court at Kuala Lumpur. While the review of the decision of the registrar on the bill of costs was still pending, the appellant filed an application (encl. 256) seeking the following:

A 1. The hearing and decision of the registrar Tuan Mohd Nasir on 4 January 2002 (the taxed bill of costs) be declared null and void.

2. The bill of costs filed by the respondent be heard afresh
B before a registrar of the High Court at Kuala Lumpur.

3. A stay of proceedings, including the issuance of the allocatur for the amount taxed by the registrar on 4 January 2002.

4. In the alternative, for an injunction to prevent the respondent
C from extracting the allocatur from the court.

5. Any further order as is deemed fair and reasonable to grant and that costs be paid by the respondent.

D **[2]** On 10 August 2005, Justice Ramly Ali presiding in the Kuala Lumpur High Court dismissed encl. 256 with costs. His reasons are basically these: the appellant's application is premature since the taxed costs is subject to review and the review is yet to be conducted, and if the appellant has any grievances or
E dissatisfactions over the attitude of the registrar these could be raised at the review stage before the judge. On the appellant's request for a stay of proceedings the learned judge found no special circumstances to support the granting of such order. Dissatisfied with this decision, the appellant appealed to us.

F **Preliminary Objection**

[3] At the outset of the hearing of this appeal, the respondent raised a preliminary objection pursuant to s. 68(1)(c) of the Courts of Judicature Act 1964, which reads:

G

> No appeal shall be brought to the Court of Appeal in any of the following cases: where the judgment or order relates to costs only, which by law are left to the discretion of the Court, except with the leave of the Court of Appeal.

H **[4]** Since no leave has been obtained by the appellant from this court, the respondent pressed for this appeal to be dismissed on the ground that it is incompetent.

[5] Attempting to influence us that this restriction does not
I apply to the facts of this case, counsel for the appellant cited three cases where the courts were of the view that if a judgment or order relates not only to costs but also to other matters then an appeal can be entertained without leave.

[6] To ascertain the precise nature of such proposition, it is necessary for us to examine each of the cases cited in detail.

[7] The first is *Anthony Lucas v. The Malayan Cultures Co., Ltd.* [1933] MLJ 21 where Murison CJ presiding in the Court of Appeal over a matter that originated from Johore summed up the facts and principle as follows:

> The trouble in this case, originates from a judgment of Thome, J delivered in the action on the 16th March, 1932. The Plaintiff sued as a pauper. Thome, J gave him judgment for $1,251.08 against the Company, and there has been no appeal against that judgment. Thome, J further ordered in his judgment that the plaintiff recover from the Defendants "the costs of this action to be taxed on the Supreme Court scale."
>
> The Registrar then proceeded to tax the Plaintiff's costs. He allowed them at $2,129.08 which is a larger sum than the amount involved. The certificate is dated 16th March, 1932. In the bill were certain items under the head of "Profit costs." The Registrar, for reasons which he sets out in the grounds for his decision, was of opinion that, according to the true construction of Thome, J's order as to costs, he ought to allow profit costs to be included in the bill taxed, and he allowed them.
>
> The Defendants' solicitor then took out a summons to review the Registrar's taxation. This was heard by Burton, J who was of opinion that profit costs could not be recovered in a pauper action. He consequently disallowed them ...
>
> A preliminary objection was taken at the hearing of the appeal upon the ground that the appeal, being concerned only with a question of costs, was not competent under section 17(c) of the Johore Courts' Enactment No. 17 of 1920. That section says that no appeal shall lie "where the judgment or order relates to costs only." This provision (with the addition of the words "except with the leave of the Court or a Judge" and a limitation to costs in the Judge's discretion) corresponds to the English law contained in section 31(i)(h) of the Judicature Act 1925; and it has been held under that section that if an order relating to costs involves a question of law and principle, an appeal does lie (James, LJ in In *Re the Rio Grande, etc.,* [1877] 5 CD at page 284).
>
> In my opinion, therefore, the preliminary objection fails, for it is clear that a question of law and principle is involved in this appeal.

[8] The second case is the English Court of Appeal case of *Crystall v. Crystall* [1963] 2 All ER 330. The facts are these:

[9] The registrar has allowed the wife's claim under the English 'Married Women's Property Act 1882' for a portion of the proceeds from the sale of the matrimonial home where the husband has insisted that she has no interest what so ever therein. Apart from this finding, the registrar also ordered the husband to pay to the wife costs of 75 guineas. Dissatisfied with the whole decision, the husband appealed to the Court of Appeal. Willmer LJ, delivering the decision of the court first recited s. 31(1)(h) of the Supreme Court of Judicature (Consolidation) Act 1925 which reads:

> (1) No appeal shall lie ... (h) without the leave of the court or judge making the order, from an order of the High Court or any judge thereof made with the consent of the parties or as to costs only which by law are left to the discretion of the court.

[10] He then proceeded:

> as I have said, the question arises whether the appeal is competent. In my judgment the appeal is competent, because this is not an appeal as to costs only. I do not think that it falls within the words of the subsection. The appeal, in so far as it relates to costs, is only part of the larger appeal against the order as a whole. Certainly if and in so far as any appeal to this court succeeds it must be competent for this court to deal with any order for costs made below. Even if this court were not disposed, in the event, to interfere with the main part of the order under appeal, it would still be competent to deal with the appeal in so far as it relates to costs. For it is not possible to say of such an appeal that it is an appeal relating to costs only. The view which I have expressed is, I think, supported at any rate by two cases to which we have been referred, *Forbes-Smith v. Forbes-Smith and Chadwick* (1), and *Griggs v. Petts* (2). I do not think that it is necessary to refer to the facts of those cases; but, as I have said, I think that they do lend support to the view which I have expressed.

[11] The third case is another English Court of Appeal decision of *Wheeler v. Somerfield & Others* [1966] 2 All ER 305. The facts are:

[12] The plaintiff has brought a libel action against the defendant for four passages in an article appearing in a weekly newspaper. He then sought leave of the court to amend his statement of claim to include a new para. 2A which says that by innuendo the article meant that he is a dishonest and untrustworthy businessman. To support this, the plaintiff gave particulars of one

hundred articles printed in the defendant's newspaper about other people. The trial judge rejected this claim under the amended para. 2A but permitted the four passages in the article to be proved. The jury found two out of the four passages constituted libel and awarded damages of 1,650 pounds to the plaintiff. Since the plaintiff appeared in person, the trial judge allowed him costs. But for the dismissal of the claim in para. 2A, the judge granted costs to the defendant. The plaintiff's taxed costs amounted to only 20 pounds 14 shillings. But the taxed costs of the defendant's against the plaintiff came up to 391 pounds 14 shillings 8 pence. Dissatisfied with the entire decision, including that of the dismissal by the trial judge of his para. 2A, the plaintiff appealed. During the appeal the defendant raised the issue on the competency of this appeal under s. 31(1)(h) of the English Supreme Court of Judicature (Consolidation) Act 1925 which prohibits the plaintiff from appealing unless leave is obtained from the trial judge who issued the said order and this has not been secured by the plaintiff.

[13] After dismissing the plaintiff's appeal on the substantive issue on the law of defamation, Lord Denning has this to say on the competency of the appeal relating to costs:

> It was said that, seeing that in the result the plaintiff has failed on the substantive points, this appeal comes down to an appeal as to costs only and, therefore, it is prohibited without the leave of the trial judge.
>
> I do not agree with that interpretation. As I have always understood this section of the Act of 1925, it means this: if a person makes no complaint against the judgment below, except about the order for costs, then he must obtain the leave of the trial judge before he can come to this court. If he makes a complaint, however, not only about the costs, but also about other matters, then he can appeal both on those other matters and also on the costs; and the court has full jurisdiction to deal with them. Even if he fails on the other matters, this court has jurisdiction to deal with the costs. His complaint on the other matters must, of course, be genuine. That is what has happened in this case. The plaintiff has brought genuine complaints of other matters. He has also complained about the costs. Although he has lost on the other matters, nevertheless his appeal as to costs stands. It is within the jurisdiction of the court to consider it.

[14] Though there is a slight difference in the wordings between s. 31(1)(h) of the English Supreme Court of Judicature (Consolidation) Act 1925 and our s. 68(1)(c) of the Courts of Judicature Act 1964 regarding the venue to apply for leave to appeal, the objective of these two pieces of legislation is similar. They are intended to restrict appeal where judgment or order relates to costs only which by law is left to the discretion of the court. But from the cases cited, this restriction does not apply to situation where the judgment or order as to costs involves law and principle or it is part of a larger appeal which includes other matters. We find this proposition sound and rational and reflects the current state of our law. With these principles fixed in our minds, we now turn to examine the facts of our instant case.

[15] If one looks at the substantive prayers in encl. 256 one would discover that they are all connected to the bill of costs of the respondent which was taxed by the registrar. In the first prayer, the appellant requested that the registrar's order be set aside. In the second and third prayers the requests are for consequential orders in the event that the first prayer is allowed. And then the fourth prayer is pleaded in the alternative to the third prayer which again is dependent on the success of the first prayer. Therefore, in essence the appellant's application in encl. 256 is for the revocation of the registrar's order made solely on the issue of costs. In dealing with an appeal of this nature we must not lose sight of the true character of the matter under appeal. The appellant's attempt to convince us that the order of costs involves law and principle and that it is part of a larger appeal are all, but a smoke screen to hide the true character of the matter under appeal. For this, it is necessary for us to be vigilant against such attempt to blur our vision from only hearing appeals which are competent. On this, we are not without authority for support. In *Wheeler v. Somerfield (supra)* Harman, LJ has this to say:

> If, of course, his appeal is as to the costs only or if the court should be satisfied that that is all he really intended to appeal about and has put in the other issues as a kind of "smoke screen", it may be that the court will refuse to entertain the real object of the appeal, which is in truth against the order as to costs only.

[16] As far as this appeal is concerned, we are of the view that it relates to costs only and hence is not competent as leave to appeal has not been obtained.

Conclusion

[17] Based on the reasons aforesaid, we dismissed this appeal with costs. We also ordered that the deposit for this appeal be paid towards the account of taxed costs.

[18] These grounds of judgment have the concurrence of my learned brothers, Mohd Ghazali Mohd Yussof, JCA and Tengku Baharudin Shah Tengku Mahmud, JCA.